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IN THE

Supreme Court of the United States

October Term, 1934

No. 854

JOSEPH SCHECHTER, MARTIN SCHECHTER, ALEX SCHECHTER, AARON SCHECHTER, A. L. A. SCHECHTER POULTRY CORPORATION and SCHECHTER LIVE POULTRY MARKET, Inc.

Petitioners

against

UNITED STATES OF AMERICA

Respondent

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

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To the Chief Justice and Associate Justices of the United States Supreme Court:

Joseph Schechter, Martin Schechter, Alex Schechter, Aaron Schechter, A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market, Inc., the petitioners above-named, respectfully pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals, for the Second Circuit, affirming judgments of conviction and sentences imposed upon the petitioners in a criminal case to the United States District

Court for the Eastern District of New York. The judgments of the Circuit Court of Appeals were entered on April 4, 1935.

Questions Presented

The appeal below presented a number of questions and no new or different questions arise on this petition. The following are the questions:

1. Did Congress attempt to delegate its legislative power to the President contrary to Article I, Section I, of the Constitution of the United States?

2. Is the National Industrial Recovery Act (48 Stat. 195) constitutional with respect to Article I, Section 8 of the Constitution (commerce clause), and more particularly is the Code of Fair Competition for the Live Poultry Industry of the metropolitan area in and about the City of New York, Code No. 12 (Record, pp. 7-43), a constitutional enactment pursuant and under Article I, Section 8 of the Constitution?

3. Is the National Industrial Recovery Act and the Code of Fair Competition for the Live Poultry Industry, etc., violative of the Eighth Amendment of the United States Constitution by imposing excessive fines, and cruel and unusual punishment?

4. Did the United States District Court for the Eastern District have jurisdiction to try the petitioners for alleged crime committed?

5. Can the District Court take judicial notice of municipal ordinances and regulations of the City of New York, if the indictment does not plead them?

6. Does the indictment and each and every count thereof, set forth the necessary elements required to make the defendants liable for any violation of the National Industrial Recovery Act and the code of the poultry industry?

7. Is there sufficient evidence in the record to sustain the petitioners' conviction of conspiracy to violate the National Industrial Recovery Act and the provisions of the Code of Fair Competition?

Statutes Involved

National Industrial Recovery Act (48 Stat. 195) so far as here applicable reads:

"TITLE I—INDUSTRIAL RECOVERY

Declaration of Policy

"SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as

may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

"Administrative Agencies

"SEC. 2. (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.

"(b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.

"Codes of Fair Competition

"SEC. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or

subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

"(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

"(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under

the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

"(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President. the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

"(e) On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the President that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course

of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title. In order to enforce any limitations imposed on the total quantity of imports, in any specified period or periods, of any article or articles under this subsection, the President may forbid the importation of such article or articles unless the importer shall have first obtained from the Secretary of the Treasury a license pursuant to such regulations as the President may prescribe. Upon information of any action by the President under this subsection the Secretary of the Treasury shall, through the proper officers, permit entry of the article or articles specified only upon such terms and conditions and subject to such fees, to such limitations in the quantity which may be imported, and to such requirements of license, as the President shall have directed. The decision of the President as to facts shall be conclusive. Any condition or limitation of entry under this subsection shall continue in effect until the President shall find and inform the Secretary of the Treasury that the conditions which led to the imposition of such condition or limitation upon entry no longer exists.

"(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

The Conspiracy Statute

Conspiracy to commit offense against United States (18 U. S. C. § 88):

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than 2 years or both."

The Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York (R. pp. 7 to 43).

Statement

The petitioners were indicted in the United States District Court for the Eastern District of New York, for entering into a conspiracy to violate the National Industrial Recovery Act against the United States on one count (18 U. S. C. par. 88), and the Code of Fair Competition for the Live Poultry Industry in and about the City of New York on 59 counts (48 Stat. 195).

Briefly the indictment charges the defendants with having entered into a scheme to commit offenses against the United States by violating the National Industrial Recovery Act and provisions of the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area of New York, by paying wages less than that required by the Code of the Industry, by permitting an employee to work hours in excess of that permitted by the Code, by

withholding sales reports, by filing false reports, by permitting its customers to select their poultry and by committing other unfair trade practices.

Prior to the commencement of the trial, petitioners demurred to the indictment upon the grounds which are now urged here (R. p. 125). To the denial of the demurrer an exception was noted (R. p. 130). And the right to a review of these questions in this Court was preserved by exceptions to the ruling upon motions to dismiss the indictment at the close of the Government's case (R. p. 1063), and at the close of the entire case (R. p. 1480), and by a motion in arrest of judgment (R. p. 1553), these rulings were made assignments of error in the Circuit Court of Appeals (R. p. 1624).

The defendants were found guilty on 19 out of the 60 counts (R. p. 1547). The defendant Joseph Schecter was sentenced to imprisonment for a period of three months and fined the sum of $1,300; the defendant Alex Schechter was sentenced to imprisonment for a period of two months and fined the sum of $1,500; the defendant Aaron Schechter was sentenced to imprisonment for a period of one month and fined the sum of $2,000; the defendant Martin Schechter was sentenced to imprisonment for a period of one month and fined the sum of $2,100; Schechter Live Poultry Market, Inc., was fined the sum of $100, and the A. L. A. Schechter Poultry Corporation was fined the sum of $425 (R. p. 1555).

An appeal was taken to the Circuit Court of Appeals for the Second Circuit and the conviction was affirmed as to 17 counts and reversed as to two counts, and two opinions were rendered.

Specifications of Errors to be Urged

1. That Title I of the National Industrial Recovery Act is an unlawful attempt by Congress to delegate its legislative power to the President contrary to Article I, Section 1, of the Constitution of the United States, and is therefore unconstitutional and void.

2. The Code and Regulations which is alleged to have been violated by the defendants herein, is unconstitutional and void, and that such code orders, rules and regulations made and provided, is the exercise by the President, Code Administrators, Code Supervisor, Boards and Committees, and their agents and representatives, of legislative power as distinguished from administrational acts of investigations and regulation. Such legislative powers by Article I, Section I of the Constitution being vested in Congress, and which legislative powers may not be abdicated or delegated by Congress.

3. That Section 3 of the Act of June 16th, 1933, National Industrial Recovery Act, an executive order approving the code herein purporting to prohibit under penalty of fine, imprisonment, the violation of the same are unconstitutional and void as repugnant to the Fifth Amendment to the Constitution providing "that no person shall be deprived of * * * his liberty or property without due process of law"; the declaration of this act that a serious emergency exists, is unconstitutional, and void as repugnant to the Fifth Amendment in so far as the declaration of such emergency affects the constitutional rights of any person; for the reason that the Constitution does not contain any such power to so legislate, or to suspend or limit constitutional guarantees by virtue of any declared emergency.

4. The law which is claimed to have been violated by these offenses is unconstitutional and void in that it violates the Eighth Amendment to the Federal Constitution, and in that it imposes excessive fines, and cruel and unusual punishment is inflicted.

5. That part of Title I of the National Industrial Recovery Act, which attempts to regulate the business of the defendants herein, is unconstitutional and void in that it seeks to control and regulate the business of the defendants in their transactions which is intrastate in nature, and which transactions are wholly within the boundaries of the State of New York, and that the same is prohibited and contrary to the Constitution of the United States and particularly the Fifth and Tenth Amendments thereof.

6. The facts averred in the indictment do not state and charge any offenses against the United States, the Code of Fair Competition of the poultry industry, and the indictment is void and unconstitutional in that it violates the Eighth Amendment of the Constitution.

7. That the National Industrial Recovery Act is unconstitutional in so far as the same is applied to the code of the poultry industry, for it is therein attempted to regulate and administer activities of the defendants' business not engaged in interstate commerce and while engaged solely in intrastate commerce.

8. That the indictment and each and every count thereof does not set forth the necessary elements of the offense which is sought to be charged.

9. That the indictment is insufficient to allege a conspiracy to violate the law and the alleged conspiracy re-

lates solely to intrastate commerce, and the defendants are likewise solely engaged in intrastate commerce.

10. That the United States District Court for the Eastern District of New York was without jurisdiction to try the petitioners under the crime alleged in the indictment.

11. That the trial Court erred in denying the defendants' motion for a Bill of Particulars.

12. That the trial Court erred in refusing to order a verdict of acquittal; for a direction of a verdict of not guilty; in denying the motion of the defendants to set aside the verdict and overruling the defendants' motion in arrest of judgment.

13. That the trial Court erred in entering judgment against the defendants on the verdict in the case and imposing the sentence upon the defendants herein.

14. That the trial Court erred in reading the indictment to the jury.

15. That the trial Court inadequately and improperly instructed the jury on the facts and law of the case.

16. That the trial Court erred in accepting the verdict which was not a true and unanimous verdict of the jury.

17. That the trial Court erred in taking judicial notice of municipal ordinances and regulations.

18. The trial Court erred in permitting prejudicial and extraneous matters to be injected in the trial of the case.

19. That the trial Court committed error in refusing to permit witnesses to testify as to the reasonableness of some of the provisions of the Code.

20. That there was insufficient evidence to sustain the petitioners' conviction of conspiracy to violate the National Industrial Recovery Act and the provisions of the Code of Fair Competition.

Reasons for Granting Writs

The question involved in this case is one of Federal law which has not been but should be settled by this Court. This case involves questions of national importance which it is in the public interest to have decided by this Court.

The questions presented by this petition require interpretation of the Constitution of the United States.

The Court should determine the questions involved in this case in that the National Industrial Recovery Act affects business and the welfare of the people as a whole.

The Court should determine whether or not Congress intended to make the acts of petitioners a crime cognizable by the United States courts.

The decision of the Circuit Court of Appeals in this case is in conflict with the decision of this Court in the case of *Panama Refining Co.* v. *Ryan*, U. S. Supreme Court, Jan. 7, 1935, U. S. Law Week 409, with the case of *United States* v. *Suburban Motor Service Corp.*, 5 Fed. Supp. 798, and with the case of *Darweger* v. *Staats*, App. Div., New York, March 5, 1935, not reported as yet.

WHEREFORE, it is respectfully prayed that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of

Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the case at bar and that the judgments of said United States Circuit Court of Appeals for the Second Circuit may be reversed by this honorable Court, and that your petitioners may have such other, further and different relief in the premises as to this Court may seem meet and just.

And your petitioners will ever pray.

JOSEPH SCHECHTER,
MARTIN SCHECHTER,
ALEX SCHECHTER,
AARON SCHECHTER,
A. L. A. SCHECHTER POULTRY CORPORATION,
SCHECHTER LIVE POULTRY MARKET, INC.,

By JOSEPH HELLER,
Counsel.

Petitioners respectfully request that if the Writ of Certiorari is granted the case be set for argument during the present term of this Court.

By JOSEPH HELLER,
Counsel.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The District Court filed an opinion denying in part and granting in part the demurrer to the indictment (8 F. Supp. 136).

The opinions of the Circuit Court of Appeals are set forth in the Record (p. 1647).

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on April 4, 1935, and no petition for a rehearing was prayed for. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Feb. 13, 1925, C. 229 (43 Stat. 938), 28 U. S. C. A., paragraph 347.

Questions Presented, Statement, Etc.

The questions presented, statement of the case, and the specification of errors relied upon, are set out in the petition.

ARGUMENT

I

The National Industrial Recovery Act is unconstitutional in that Congress has improperly delegated its legislative power to the President.

Article 1, Section 1, of the Constitution, provides that all legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Congress may nominate anyone to execute its mandate, but it may not delegate its power to make the mandate.

Field v. *Clark*, 143 U. S. 649.

Congress may appoint others to fill in the details by the establishment of administrative rules and regulations to administer the laws that govern, but not to formulate the law by such regulations.

United States v. *Grimaud*, 220 U. S. 506.

The petitioners maintain that the power delegated to the President, and in turn sub-delegated by him to his agents, was not a delegation by Congress of administrative acts, to fill in details, but rather a delegation of power to make laws. That in the National Industrial Recovery Act we do not find any legislative policy and no definite standards.

The petitioners submit the following authorities to support their view:

Panama Refining Co. v. *A. D. Ryan*, U. S. Supreme Court, Jan. 7, 1935; U. S. Law Week. 409;

United States v. *Suburban Motor Service Corp.*, 5 Fed. Supp. 798;
People v. *Grant*, 242 App. Div. 310, N. Y.;
Hampton v. *United States*, 276 U. S. 394;
United States v. *Cohen Groceries*, 255 U. S. 81;
Darweger v. *Staats, et al.*, App. Div., N. Y., March 5, 1935, not officially reported.

II

The Code of Fair Competition for the Live Poultry Industry alleged to be adopted pursuant to the National Industrial Recovery Act is unconstitutional in its application to the defendants.

The Code seeks to regulate the activities of all those engaged in the live poultry industry *from the time such poultry comes into the Metropolitan Area to the time it is first sold in slaughtered form* (R. fols. 27-28).

The activity of the defendants (slaughterers) as alleged in the indictment starts from the time they purchase the poultry from the commission men in New York City until it is sold in slaughtered form to the retail trade. Such activity is therefore purely intrastate and is not subject to Federal regulation under the commerce clause.

Hammer v. *Dagenhart*, 247 U. S. 251;
Swift v. *United States*, 196 U. S. 375;
Stafford v. *Wallace*, 258 U. S. 495.

The activity of the defendant was not in a commodity still in interstate commerce.

Greater New York Live Poultry Chamber of Commerce v. *United States*, 47 Fed. (2d) 156.

Nor did the activity of the defendants materially affect interstate commerce in live poultry within the intent and meaning of the statutes and decisions of this Court so that the defendants' activities may be subjected to Federal control.

Southern Railway v. *United States*, 227 U. S. 20;
Minnesota Rate Case v. *United States*, 230 U. S. 410.
United States v. *So. California Wholesale Grocers*, 7 Fed. (2d) 944;
Industrial Association of San Francisco v. *United States*, 45 Sup. Ct. Rep. 413.

III

The demurrer should have been sustained as to Counts 4, 5, 38 and 60.

The petitioners maintain that the Federal courts may not take judicial notice of a New York City rule or regulation or ordinance unless pleaded in the indictment.

Garlich v. *Northern Pacific Railway*, C. C. A., 131 Fed. Rep. 837
Gay v. *United States of America*, 12 Fed. (2d) 433.

Count 38 charges a violation of the Code provisions by reason of the filing by the defendants of false reports. The National Industrial Recovery Act and the Code do not make it a crime to file false reports. The requirement is to file a report.

The petitioners contend that they may not be punished unless the act complained of was plainly and unmistakably within the statute.

Todd v. *United States*, 152 U. S. 526.

Error was committed in refusing to allow the defendants to prove that the prohibitions contained in the Code were not unfair methods of competition.

It is for the Court to determine as a matter of law what the words unfair method of competition may include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals or as against public policy. Competition was heretofore encouraged. The Code proposes to make competition unlawful. The National Industrial Recovery Act was certainly not intended to fetter free and clear competition.

Federal Trade Commission v. *Gate*, 253 U. S. 421.

The defendants were convicted on some ten counts which relate to the sale of chickens by the defendants to the retailers under circumstances which were never heretofore regarded as an unfair method of competition. The provision is not only unreasonable, but unnecessary.

The defendants were charged with permitting their customers to select their poultry. For these acts the defendants have been severely punished. Until the adoption of the Code in question, it has never been unlawful to permit the buyer to select the grade and size of the chickens he had a demand for.

IV

The defendants were not engaged in a conspiracy to violate any law, nor were they properly convicted on this count.

There is no penalty provided by Congress for a violation of the National Industrial Recovery Act. The indictment does not charge a conspiracy to violate rules and regulations. The mere fact that the defendants are blood relations does not warrant a presumption that they entered into a conspiracy to violate the law.

The Circuit Court waived aside the claim of the defendants that they were not guilty of the conspiracy by a mere statement that the record sustains the conviction. A careful reading of the record indicates the contrary.

There can be no conspiracy to violate the National Industrial Recovery Act.

Amazon Petroleum Corp. v. *Railroad Com.*, 5 Fed. Supp., page 649.

V

Errors by the Trial Court

The charge to the jury was inadequate and confusing, in that the jury did not understand what was meant by the general terms used, such as "interstate commerce," affecting "interstate commerce," "overt acts," "vitalizing the conspiracy." The trial Court erred in reading the indictment to the jury.

The verdict was not a true verdict, as the jury was in considerable doubt as to its duties.

In polling the jurors, the Court directed them to find the defendants guilty (R. fols. 4653-57).

The Court erred in denying the motion of the defendants to dismiss the indictment at the close of the Government's case, at the close of the entire case and in arrest of judgment, to which an exception was duly taken (R. fols. 3891, 3195, 4438, 4657, 4662).

These are some of the questions to be determined upon a review of this case, and we believe that the questions are important and serious enough to warrant this Court to grant the writs of certiorari respectfully prayed for.

CONCLUSION

This petition for writs of certiorari should be granted.

Respectfully submitted,

JOSEPH HELLER,
Counsel.

JOSEPH HELLER
and
JACOB E. HELLER,
On the Brief.